

vol. 7

2

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTHWESTERN DIVISION

MDU Resources Group, Inc., d/b/a )  
Montana-Dakota Utilities Co., )

Plaintiff, )

-vs- )

W. R. Grace & Co. and )  
W. R. Grace & Co.-Conn., )

Defendants. )

Civil No. A1-90-122

TRANSCRIPT OF TRIAL

Taken at  
United States Courthouse  
Bismarck, North Dakota  
May 26, 1992

BEFORE THE HONORABLE BRUCE M. VAN SICKLE - SENIOR JUDGE  
-- AND A JURY --

EMINETH & ASSOCIATES  
Court Reporters  
BISMARCK, NORTH DAKOTA  
255-3513

1 A. Yes, he did.

2 Q. Does the report reflect the methods that he used to  
3 analyze these dust samples?

4 A. Well, at the time these were done there was only one  
5 method available to analyze TEM dust samples, but he --

6 MR. CHILDS: I'm going to object, Your Honor, and  
7 move to strike as nonresponsive to the question.

8 THE COURT: I overrule that. Finish your answer,  
9 please.

10 THE WITNESS: In his report, he gives the specifics  
11 of who analyzed them and who reviewed the analysis data and  
12 the specifics regarding the magnification used, the area  
13 examined, the number of grid openings that were looked at; it  
14 could only have been the standard EPA draft protocol.

15 MR. CHILDS: Your Honor, we would again assert our  
16 motion -- our objection for lack of foundation. Mr. Longo  
17 has been listed as one of their experts and we think that  
18 that testimony is best served coming through him.

19 MR. SPEIGHTS: I wasn't through yet with my  
20 questions, Your Honor.

21 THE COURT: Please proceed with your examination.

22 Q. (MR. SPEIGHTS CONTINUING) Have you worked on various  
23 projects with Dr. Longo?

24 A. Yes.

25 Q. Have you worked on various experiments with Dr. Longo in

1 which you have taken dust and air samples?

2 A. Yes.

3 Q. And have you worked closely with Dr. Longo in these  
4 projects which have resulted in analysis of settled dust in  
5 buildings?

6 A. Yes.

7 Q. Is Dr. Longo somebody that you rely on in your field on  
8 a regular basis in the analysis of dust samples?

9 A. Yes.

10 MR. SPEIGHTS: That's my foundation, Your Honor. I  
11 do intend to call Dr. Longo to the stand, but I think that  
12 Mr. Ewing can testify about -- excuse me -- can testify about  
13 the results in the MDU building, so he can explain his  
14 evaluation of the building in light of the information which  
15 was forwarded to him.

16 MR. CHILDS: Your Honor, our position that is we  
17 have no ability to cross this individual as to the method  
18 used, which cuts to the heart of our Frye motion, and Dr.  
19 Longo is the one who applied this indirect-method sonication  
20 and he's the one we'd like to cross-examine on that method  
21 before the results are made public to this jury, because this  
22 Court may find the Frye motion is appropriate in this case.

23 THE COURT: I overrule, and the reason being that  
24 it has been shown that this was a -- the -- there was a  
25 standard method and, therefore, that this -- and it also has

1 been shown that this witness has more than the average  
2 layman's ability to evaluate the product. I overrule and  
3 receive the evidence.

4 Would you please proceed.

5 MR. CHILDS: Excuse me, Your Honor. In light of  
6 the Court's ruling, may we voir dire this witness on  
7 sonication for the basis of our Frye motion?

8 THE COURT: Certainly.

9 MR. CHILDS: Thank you, Your Honor.

10 EXAMINATION BY MR. CHILDS:

11 Q. Mr. Ewing, the method used to test this dust is called  
12 the indirect method; isn't that true?

13 A. I think you're referring to the indirect/direct method  
14 of analysis of air samples. That's where the indirect is  
15 normally referred to.

16 Q. The dust was prepared by a process called sonication;  
17 isn't that correct?

18 A. That is part of the preparation method, yes.

19 Q. Okay. As an industrial hygienist, do you rely on the  
20 EPA Government publication the Green Book for guidance?

21 A. Yes, to some extent.

22 Q. The Green Book says "Because the results of this testing  
23 are difficult to interpret and evaluate at this time,  
24 building owners should carefully consider the appropriateness  
25 of this testing to their situation."

1           Isn't that the Green Book's statement with respect  
2 to dust testing in buildings?

3       A.   Well, I think that's part of the statement. I think you  
4 skipped over the first part, and the EPA has put out a  
5 guidance document on specifically the direct versus indirect  
6 preparation methods.

7       Q.   And isn't that guidance document, sir, what is called  
8 the EPA's draft protocol?

9       A.   No, not -- the published -- you know, the Blue Book says  
10 ID, ID across it.

11       Q.   Are you aware of the EPA's draft protocol regarding dust  
12 preparation?

13       A.   Yes; they've -- they've turned over everything to the  
14 ASTM committee at this point.

15       Q.   Isn't it true that the EPA draft protocol when it -- it  
16 addresses dust testing and sonication says the following:

17            "As this method involved the use of sonication to  
18 disperse the fibers in the dust sample prior to dilution  
19 and filtration, it will increase the number of small  
20 fibers counted in relation to what may have actually  
21 been found on the surface. At present, no firm  
22 conclusions can be drawn regarding potential exposure  
23 hazards from asbestos-contaminated surface dust and no  
24 limits have been set to define a level requiring  
25 abatement or cleaning of the area."

1           Doesn't this draft protocol say, sir, that with  
2       respect to testing of dust, that there are no limits, that  
3       there is no set protocol, and that's because it increases the  
4       number of small fibers?

5       A.   Well, I've read the draft protocol many times. I think  
6       what you're reading from is from a forward that was suggested  
7       by some people on the committee, and I don't think the -- I  
8       don't think the forward has ever been incorporated yet into  
9       the protocol itself. There are portions of that that you  
10      read that I would agree with, other portions I might disagree  
11      with.

12      Q.   Isn't it true that the Environmental Protection Agency,  
13      both in the Green Book and also in this draft protocol, which  
14      addresses dust, do not accept the dust testing as a way of  
15      assessing the condition of buildings because sonication,  
16      which is the process you used, increases the number of small  
17      fibers in the count, and that's misleading? Would you agree  
18      with that, sir?

19      A.   No, I wouldn't. The EPA -- if you recall the PEI study  
20      on carpet cleaning, for example, was done using that exact  
21      method. The EPA uses the method in their own -- their own  
22      work.

23           I would agree that I think you will find some  
24      increase in small fibers due to dispersion of clusters and  
25      bundles at the ends of the bundles; but with regards to dust

1 sampling, honestly, I've never heard anyone really argue that  
2 some other type of method should be used for analysis because  
3 there -- for dust sampling, there is no other way to do it  
4 other than to redeposit it.

5 Q. In addition to your relying as part of your work in this  
6 field on the EPA -- EPA draft protocol, don't you also rely  
7 on a recent publication called the "Health Effects Institute  
8 Report" that came out as a mandate from Congress? Are you  
9 familiar with that report?

10 A. Which one are you talking about?

11 Q. The "Health Effects Institute Report" that came out  
12 several years ago. Are you familiar with that report?

13 A. Yes. There's been three reports.

14 Q. Okay. The one I'm referring about is "Asbestos in  
15 Public and Commercial Buildings, a Literature Review and  
16 Synthesis of Current Knowledge."

17 A. Yes.

18 Q. Okay. And isn't it true, sir, that what they say about  
19 dust is that sampling surface dust is a particular problem as  
20 there is no expectation of uniform dispersion and many  
21 samples must be taken and either separately analyzed or  
22 combined into a single sample -- into a single analysis. The  
23 latter may give misleading results.

24 So don't we have now three sources that you rely on  
25 in your field, the EPA Green Book, the EPA draft protocol and

1 now the Health Effects Institute, that say dust sampling is  
2 misleading?

3 A. Well, I think I would agree with what HEI said on that,  
4 but -- and am working with HEI at the present time on two  
5 research studies, one of which involves the settled dust  
6 testing in public and commercial buildings. So I wouldn't  
7 say that they just abandoned the method. I would agree that  
8 you can't take a surface dust sample and then say this is  
9 what someone is breathing. That would be inappropriate to do  
10 that, and I'm not trying to do that at all. What it does is  
11 gives you an approximation of what is present on a surface to  
12 help you prevent exposure in the future, because you know  
13 this is here, and that's the main purpose for doing it.

14 MR. CHILDS: Your Honor, based on the Green Book  
15 and the EPA protocol and the HEI report, the statements I've  
16 just read, again we would renew our motion that the Court has  
17 discussed with us, the Frye motion.

18 THE COURT: I overrule the renewed motion. And  
19 again we have a break.

20 Members of the jury, please remember the admonition  
21 I've previously given you. At this time we will recess until  
22 3:20 -- 3:20.

23 (Recessed at 3:05 p.m., Tuesday, May 26, 1992.)  
24  
25



*Frye Motion*  
*Libby*  
Vol. 9

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1 decision. It is not reliable science and it is not something  
2 that is relied on by experts in the field, and the  
3 foundation, I think, as Your Honor knows, has come up; so we  
4 would just make that objection for the record.

5 THE COURT: I think the question is whether or not  
6 you can get him to say -- or get somebody to say before he  
7 starts to testify -- that his scientific method is not  
8 scientific or at least not recognized as scientific. I doubt  
9 that -- I guess you're right there. I doubt that he'll say  
10 it, but maybe somebody else will. I don't know. But I've  
11 got to have -- as it stands, you know. But nevertheless,  
12 yes, by all means, your motion is in order. I deny it, to  
13 keep the record clean, and until something develops, if you  
14 can bring it up, why it won't bother me at all to direct the  
15 jury to disregard the testimony.

16 MR. CHILDS: Thank you, Your Honor.

17 THE COURT: All right. Let's give the jury a  
18 chance -- I want to talk to them a second.

19 (Recessed at 1:33 p.m. until 1:36 p.m., the same day, at  
20 which time the following proceedings were continued in open  
21 court, in the presence of the jury:)

22 THE COURT: Mr. Speights.

23 Q. (MR. SPEIGHTS CONTINUING) Dr. Longo, Mr. Ewing has  
24 already testified that the results of the dust samples in  
25 this building were an average of 78 billion 600 million. Was